

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-15-00455-CV

IN RE COMMITMENT OF MARVIN GLENN CLARK

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 15-03-02936-CV

MEMORANDUM OPINION

Marvin Glenn Clark appeals from a judgment on a jury verdict that resulted in his civil commitment as a sexually violent predator. *See* Tex. Health & Safety Code Ann. § 841.081(a) (West Supp. 2016). In four issues brought on appeal, Clark argues that as amended in 2015, Chapter 841 of the Texas Health and Safety Code is facially unconstitutional; he contends the trial court erred in admitting into evidence four affidavits that were included in a Florida penitentiary packet; and he challenges the legal and factual sufficiency of the evidence supporting the jury's

verdict. We overrule Clark’s issues and affirm the trial court’s judgment and order of civil commitment.

Constitutional Challenge

In his first issue, Clark argues that Chapter 841 of the Texas Health and Safety Code is facially unconstitutional because statutory amendments that came into effect approximately two months before his trial create a tiered treatment program that includes a “‘total confinement facility’ with the ‘possibility’ of ‘less restrictive’ housing at some unspecified future date depending on the person’s progress in treatment[.]” without eliminating severe criminal penalties for violating legislatively enumerated civil-commitment requirements. *See* Tex. Health & Safety Code Ann. § 841.0831(b) (West Supp. 2016). He argues that as amended, Chapter 841 fails the “‘intent-effects test” utilized by the Texas Supreme Court in *In re Commitment of Fisher*. *See* 164 S.W.3d 637, 645–53 (Tex. 2005).

Clark did not raise a constitutional challenge to the statute in the trial court; therefore, he waived his complaint regarding the statutory amendments that were already in effect when his case was tried. *See In re Commitment of Clemons*, No. 09-15-00488-CV, 2016 WL 7323298, at *12 (Tex. App.—Beaumont Dec. 15, 2016, pet. filed) (mem. op.). Clark argues his challenge may be brought for the first time on appeal because after the case was tried, the statute was declared unconstitutional

by a trial court ruling in another civil commitment case. The trial court's order in that case was reversed on appeal after Clark filed his brief for his appeal. *In re Commitment of May*, 500 S.W.3d 515, 520–24 (Tex. App.—Beaumont 2016, pet. filed). In *May*, we held that as amended in 2015, Chapter 841 of the Texas Health and Safety Code is not unconstitutionally punitive. *Id.* We decline to revisit our holding in *May*, and we reiterate that Chapter 841 of the Texas Health and Safety Code, as amended in 2015, is neither punitive nor facially unconstitutional. *See id.* Clark waived this issue. We overrule issue one.

Arrest Affidavits

In his second issue, Clark argues that the trial court erred in admitting into evidence copies of four complaint arrest affidavits that were included in the penitentiary packet for Clark's Florida convictions. "Rule 803(8) of the Rules of Evidence generally provides an exception to hearsay for police records offered into evidence in a civil case." *Clemons*, 2016 WL 7323298, at *9; *see* Tex. R. Evid. 803(8). "Rule 803(8) excludes investigative reports when offered against the defendant in a criminal case, not because law enforcement officers are disinclined to be truthful, but because a criminal case pits law enforcement and defendants as adversaries, and conviction should not be based on an officer's testimony offered *in absentia*." *Tex. Dep't of Pub. Safety v. Caruana*, 363 S.W.3d 558, 564 (Tex. 2012).

Generally, police reports may be used in a civil case. *Id.* (explaining that an officer’s report was admissible in an administrative license revocation proceeding). We overrule issue two.

Sufficiency of the Evidence

Issues three and four challenge the legal and factual sufficiency of the evidence supporting the jury’s verdict that Clark is a sexually violent predator. Both issues were preserved through a motion for new trial. On appeal, Clark argues the jury’s verdict is based on two experts’ speculative and conclusory opinions that lack an adequate evidentiary basis.

Under a legal sufficiency review, we assess all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could find, beyond a reasonable doubt, the elements required for civil commitment as a sexually violent predator. *In re Commitment of Mullens*, 92 S.W.3d 881, 885 (Tex. App.—Beaumont 2002, pet. denied). As the factfinder, the jury has the responsibility to fairly resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Id.* at 887. Under a factual sufficiency review in a civil commitment proceeding, we weigh the evidence to determine “whether a verdict that is supported by legally sufficient evidence nevertheless

reflects a risk of injustice that would compel ordering a new trial.” *In re Commitment of Day*, 342 S.W.3d 193, 213 (Tex. App.—Beaumont 2011, pet. denied).

In a civil commitment proceeding under Chapter 841 of the Texas Health and Safety Code, the State must prove, beyond a reasonable doubt, that a person is a sexually violent predator. Tex. Health & Safety Code Ann. § 841.062(a) (West 2010). A person is a “sexually violent predator” if the person is a repeat sexually violent offender¹ and suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. Tex. Health & Safety Code Ann. § 841.003(a) (West Supp. 2016). A “[b]ehavioral abnormality” is “a congenital or acquired condition that, by affecting a person’s emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person.” *Id.* § 841.002(2) (West Supp. 2016). “A condition which affects either emotional capacity or volitional capacity to the extent a person is predisposed to threaten the health and safety of others with acts of sexual violence is an abnormality which causes serious difficulty in behavior control.” *In re Commitment of Almaguer*, 117 S.W.3d 500, 506 (Tex. App.—Beaumont 2003, pet. denied).

¹ Clark does not challenge his status as a repeat sexually violent offender in his appellate brief.

The State presented trial testimony from a psychologist, Darrell Turner, and a psychiatrist, Sheri Gaines. Each expert offered an opinion— based upon his or her education, training, and experience, and using the accepted methodology for experts in their fields—that Clark suffers from a behavioral abnormality that makes him likely to engage in another predatory act of sexual violence. Generally, “when a reliability challenge requires the court to evaluate the underlying methodology, technique, or foundational data used by the expert, an objection must be timely made so that the trial court has the opportunity to conduct this analysis.” *See Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004). However, “[b]are, baseless opinions will not support a judgment even if there is no objection to their admission in evidence.” *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009).

An expert’s opinion testimony cannot support a jury’s verdict if it is based upon facts contrary to those on the face of the record. *See Arkoma Basin Expl. Co. v. FMF Assocs. 1990–A, Ltd.*, 249 S.W.3d 380, 388 (Tex. 2008). Clark argues Dr. Turner’s and Dr. Gaines’s testimonies are speculative or conclusory on the face of the record because they are based upon unreliable evidence. In his trial, Clark admitted that he masturbated in front of teenaged boys, that he showed pornography to boys, and he encouraged boys to masturbate with him. He admitted that he was

convicted for attempted sexual assault and indecency with a child by exposure, but he denied engaging or attempting to engage in sexual contact with a child notwithstanding his guilty pleas. The record shows, however, that Clark was convicted of engaging in conduct that included having sexual contact with a child and of attempting to engage in sexual conduct with or to sexually assault a child. In a civil proceeding, public records from a criminal case are not, as Clark argues, unreliable as a matter of law. *See Caruana*, 363 S.W.3d at 564; *Clemons*, 2016 WL 7323298, at *9.

Clark argues that Dr. Turner and Dr. Gaines based their opinions largely upon conduct of Clark that is not considered to be sexually violent. According to Dr. Turner, showing pornography to and masturbating in front of boys is grooming behavior that gradually desensitizes children to sexual activity with an adult. Dr. Turner stated that the grooming of a large number of victims in a short period of time was an important aspect in evaluating Clark's offenses. Clark's criminal records reveal that in some instances the grooming behavior progressed to sexually violent offenses. *See generally* Tex. Health & Safety Code Ann. § 841.002(8). Dr. Turner explained that Clark demonstrated a sexual preoccupation that continued as recently as 2013. Dr. Turner testified that Clark has personality disorders, including "personality disorder not otherwise specified with narcissistic and antisocial

features” and “exhibitionistic disorder”, which affect Clark’s emotional and volitional capacity. Dr. Turner used an actuarial instrument, the Static-99R, to assess Clark’s risk to reoffend. Clark’s score of 8 placed him at a high risk to reoffend.

Dr. Gaines diagnosed Clark with “other specified paraphilic disorder.” According to Dr. Gaines, Clark’s sexual attraction to adolescent males is a chronic condition, and his exhibitionistic behavior is a risk factor for repeating contact sexual offenses. Dr. Gaines testified that Clark had a clean prison disciplinary history, but his source of stimulation, adolescent boys, was not available to him in prison. Dr. Gaines also testified that Clark reoffended after his previous release from prison. Group statistics show that generally urges decrease at Clark’s age, but his 2013 offense indicates those urges are not decreasing in Clark’s specific case.

Clark claims that he had no opportunity to challenge the basis for the experts’ opinions other than through cross-examination, and he suggests that that is relevant in a sufficiency analysis. Yet, Dr. Gaines and Dr. Turner were deposed in this case and nothing in the record suggests that Clark did not have access to the same records that the State’s experts used in their evaluations.

Through their testimony, Dr. Turner and Dr. Gaines present reasoned judgment based upon established research and techniques for their professions and not the mere *ipse dixit* of a credentialed witness. *See Day*, 342 S.W.3d at 206. We

hold the evidence is legally sufficient to support the jury's verdict. Issue three is overruled.

Clark relies on the same arguments for his factual sufficiency challenge that he relied on in advancing his legal sufficiency claim. Weighing all of the evidence, we conclude the verdict does not reflect a risk of injustice that would compel ordering a new trial. *See id.* at 213. We overrule issue four, and we affirm the trial court's judgment and order of civil commitment.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on June 13, 2016
Opinion Delivered February 23, 2017

Before Kreger, Horton, and Johnson, JJ.